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In The
Supreme Court of the United States

WALTER C. DUMAS AND
DUMAS & ASSOCIATES LAW CORPORATION,

Petitioners,

vs.

BARCOSH, LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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ARGUMENT

On page 2 of its opposition to petitioners' petition for writ of certiorari, Barcosh admits that the September 22, 2006, judgment dismissed Barcosh's suit to enforce the April 4, 2006, judgment. This is not the first time Barcosh has admitted its petition to enforce the foreign judgment of April 4, 2006, was dismissed by the September 22, 2006, judgment. In support of its cross-motion for summary judgment, Barcosh states in paragraph 31 of its Statement of Uncontested Material Facts, "The court granted the summary judgment and dismissed Barcosh's petition to enforce the April 4th judgment with prejudice."

However, the Fifth Circuit states in its opinion (App. 4 of petitioners' petition for writ of certiorari) that when the April 2006 judgment was set-aside for procedural reasons, the Louisiana state court action was dismissed without prejudice.

If the Louisiana state court action had been dismissed before the September 22, 2006, judgment, why did Barcosh not file the appropriate motion before the September 22, 2006, hearing on petitioners' motion for summary judgment to have the motion for summary judgment dismissed?

Instead, Barcosh filed an opposition to the motion for summary judgment and on the day of the hearing, argued its opposition. Why did Barcosh not present and introduce the July 10, 2006, judgment of dismissal that was signed by the same judge who was hearing the motion for summary judgment? Why did Barcosh not want to present this July 10, 2006,

judgment to the court? The answer came months later. The judgment was invalid.

Barcosh is correct in stating there is no judgment in reference to the oral reasons for judgment issued by the court on May 15, 2007. There is no judgment because counsel for Barcosh wrote a letter to the judge objecting to her oral reasons and asking her not to sign a judgment until Barcosh could have a hearing on the proposed judgment.

However, instead of requesting a hearing in the 19th Judicial District Court, Barcosh went to federal court and obtained an order restraining and permanently enjoining petitioners from taking any steps to prosecute any legal actions including, but not limited to, filing any pleadings or requesting any hearings in two (2) state court suits. Therefore, petitioners could not take any action to obtain a signed judgment and continue with their action against Barcosh. Why did Barcosh need an order permanently restraining and enjoining petitioners from proceeding with its suit against Barcosh? The injunction barring two (2) state court proceedings is broader than necessary to protect or effectuate the district court judgment even if it were valid. *Chick Kam Choo v. Exxon Corporation,* 486 U.S. 140, 108 S. Ct. 1684, 100 L. Ed.2d 127 (1988).

Upon learning of the July 10, 2006, judgment, petitioners moved immediately to have it set-aside,

and it was set-aside by the same judge who signed the judgment on December 5, 2006.[1] Why did Barcosh not take any action to set-aside the December 5, 2006, judgment?

As to Barcosh's argument that the oral reasons for judgment (App. 11 of petitioners' petition for writ of certiorari) was submitted by petitioners in the record of the 19th Judicial District Court on May 15, 2007, a review of the document clearly shows it was issued by the court. If Barcosh believed the oral reasons for judgment were submitted by petitioners, why did Barcosh's counsel write the judge asking her not to sign the judgment in lieu of filing whatever motion it believed was appropriate? The answer, there was no appropriate motion to file.

Barcosh, in its opposition, includes a colloquy between counsel and the court and wanted this colloquy to be accepted as the 19th Judicial District Court giving Barcosh the right to bring another suit to enforce another judgment on the same subject matter. It should be pointed out that Barcosh's counsel did not mention the August 2006 judgment during this colloquy. If Barcosh believed the court gave it the right to file another petition for enforcement of a foreign judgment, why did it not file such a petition in the 19th Judicial District Court?

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[1] In its opposition to the petitioners' petition for writ of certiorari, Barcosh admits in footnote 4 that the July 10, 2006, judgment was set-aside on December 5, 2006.

Barcosh argued that petitioners for the first time raised the issue that Dumas & Associates Law Corporation was not a party in the Ohio proceedings. This argument is incorrect.

Further, the issue is addressed in the petition for writ of certiorari under the heading "A new trial should have been granted and relief from judgment should have been granted."

The Fifth Circuit, by affirming of the judgment of the district court, contradicts its ruling in *Baker v. Dearie*, 161 Fed. Appx. 361 (5th Cir. 2005). In *Baker*, a Louisiana court had held that an insurance company had a duty to defend its insurer in litigation in Louisiana. Afterward, in a proceeding in federal court, the district court granted a summary judgment in favor of the insurance company. The insurer appealed.

The Fifth Circuit held that in a diversity case, state law determines the preclusive effect of a prior state court judgment citing La. Rev. Stat. 13:4231(3).[2] The Fifth Circuit reversed the summary judgment that had been granted to the insurance company.

The same principal of law applies in this diversity case. The state court rendered a judgment

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[2] A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

approximately seven (7) months before the federal court judgment. The same petition filed in Ohio in reference to the two (2) notes was the basis for the April 2006 and August 2006 Ohio judgments.

The April 2006 and August 2006 judgments were based upon the same petition. You cannot have a judgment without a petition. The August 2006 judgment sets forth the same notes that were in the April 4, 2006, judgment. The same evidence was used to obtain both judgments. *Nelson v. City of Moss Point, Mississippi*, 701 F.2d 557 (5th Cir. 1983).

The Fifth Circuit has held that a state court judgment commands the same *res judicata* effect from the federal court as it would have had in the court that rendered it without regard to whether the state court applied state or federal law. *Rollins v. Dwyer,* 666 F.2d 141, 144 (5th Cir. 1982); *Sider v. Valley Line*, 857 F.2d 1043, 1046 (5th Cir. 1988).

The district court, neither in its ruling denying petitioners' motion for summary judgment nor its ruling granting Barcosh's motion for summary judgment, addressed the defense of preclusion by judgment raised by petitioners. Also, this issue was not addressed by the Fifth Circuit.

Both the April 2006 and August 2006 judgments arose out of the same transaction or occurrence. See *Matter v. Howe,* 913 F.2d 1138 (5th Cir. 1990).

Louisiana Code of Procedure 425 (preclusion by judgment) provides in part " . . . a party shall assert

all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation."

As a result of both judgments arising out of the same transactions or occurrence and Barcosh's failure to include the August 2006 judgment in the litigation involving the April 2006 judgment, the August 2006 judgment is barred by preclusion by judgment.

Barcosh argues incorrectly that the August 2006 judgment was not before the court. Barcosh still fails to accept under Louisiana law there is no requirement that a petition or pleading had to be actually filed in order for preclusion by judgment to apply. The test is whether the cause of action before the court and the cause of action that should be before the court arose out of the same transaction or occurrence. The April 2006 judgment was before the court, and the August 2006 judgment should also have been before the court.

Barcosh now takes the position that the September 22, 2006, judgment is invalid. It's too late. If Barcosh believed the September 22, 2006, judgment was invalid, why did Barcosh not appeal the judgment?

More importantly, Louisiana law provides that a final judgment acquires the authority of a thing adjudged, no court has jurisdiction to change the judgment, regardless of the magnitude of the final

judgment. *Tolis v. Board of Supervisors of Louisiana State University*, 660 So.2d 1206 (La. 10/16/95).

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the decision and opinion of the Fifth Circuit.

Respectfully submitted,

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